**ST 01-22**
**Tax Type: Sales Tax**
**Issue: Gross Receipts**
**Tangible Personal Property**

**STATE OF ILLINOIS**
**DEPARTMENT OF REVENUE**
**OFFICE OF ADMINISTRATIVE HEARINGS**
**CHICAGO, ILLINOIS**

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| **THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS**<br><br>**v.**<br><br>**"APEX AUTO SALES, INC.",**<br><br>**Taxpayer** | **No. 00-ST-0000**<br>**Reg. No. 0000-0000**<br>**NTL No. SF 0000000000000** |

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## FINAL ADMINISTRATIVE DECISION

**SYNOPSIS:**

The Illinois Department of Revenue ("Department") audited the books and records of "Apex Auto Sales, Inc." ("Apex") for the period beginning January 1, 1996 through September 30, 1998. Based on this audit, the Department determined that "Apex's" receipt of payments from "Champion Motors Corporation" ("Champion") should be included in "Apex's" gross receipts and subject to Illinois Retailers' Occupation Tax for the period in question. On October 5, 1999, the Department issued Notice of Tax Liability No. SF 0000000000000, which "Apex" timely protested. Subsequent to the protest, both parties filed cross motions for summary judgment which were fully briefed. As a result of these motions, and the affidavits attached thereto, the administrative law judge submitted a "Recommended Order Regarding the Parties' Cross Motions For Summary Judgment" ("Recommended Order") to me, as Director, for consideration.

**ISSUE:**

This sole issue in controversy here is whether payments received by "Apex" from "Champion" as part of "Champion's" Employee/Retiree New Vehicle Purchase/Lease Program ("Program") are "gross receipts" within the meaning of 35 ILCS 120/1 and 35 ILCS 120/2-10 and, therefore, subject to Illinois Retailers' Occupation Tax ("ROT").

Upon due consideration and following a review of the entire record, the recommendation of the ALJ granting "Apex's" motion for summary judgment and denying the Department's cross-motion, cannot be accepted. I disagree with his conclusion that the payments received by "Apex" from "Champion" are reductions in the cost of the vehicle sold and are not gross receipts subject to Illinois ROT.

My decision in this matter is based solely upon the legal conclusions that are fairly drawn from the motions and affidavits submitted by "Apex" and the Department, which have been carefully examined. Additionally, I have apprised myself of those pertinent provisions of Illinois statutes and regulations and case law related to the issues in controversy. With due regard to the recommendation of the ALJ, I have determined that the motions and affidavits provide a sufficient record to permit the appropriate review and issuance of a final administrative decision that differs from the Recommended Order, in accordance with the provisions of 86 Ill. Adm. Code, Ch. I, Section 200.130. See also Highland Park Convalescent Home v. Health Facilities Planning Commission, 217 Ill. App. 3d 1088 (2d Dist. 1991).

**FINDINGS OF FACT**:

**A. Facts Not In Dispute**

The ALJ's Recommended Order lists twenty-three "Facts Not In Dispute" which form the basis for his conclusions. I agree that findings of fact one through twelve and fifteen through twenty-three are not in dispute, and each of these facts is incorporated by reference into this "Final Administrative Decision." The facts that are specifically discussed in this "Final Administrative Decision" are reiterated below:

2. "Apex" is engaged in business as an automobile dealer, and "Champion Motors Corp." (hereinafter, "Champion") is a manufacturer and wholesaler of vehicles. *See* "John Doe" Aff. ¶¶ 5-12; DMSJ ¶ 15. During the period at issue, "Apex" was a party to a valid sales and service agreement with "Champion". TMSJ ¶ 5; "John Doe" Aff. ¶¶ 5-6; DMSJ ¶ 15.

3. "Champion" established an Employee/Retiree New Vehicle Purchase/Lease Program ("Program") to allow active and retired employees of "Champion", and their family members, to purchase or lease "Champion" vehicles at a reduced price. TMSJ ¶ 6 & Exhibit 2 thereto ¶¶ 2, 4-5 (exhibit 2 is the affidavit of "Richard Roe" (hereinafter "Roe" Aff. ¶ [ ]"), a Director of "Champion's" Fleet Operations division, which administers the Program); "John Doe" Aff. ¶ 7; DMSJ ¶ 15.

4. Any automobile dealer who is a party to a valid sales and service agreement with "Champion" is eligible to participate in the Program. TMSJ ¶ 7; "Roe" Aff. ¶ 4; DMSJ ¶ 15.

5. "Apex" is a participating dealer in the Program. TMSJ ¶ 7. "John Doe" Aff. ¶ 6; DMSJ ¶ 15.

6. A "Champion" dealer that participates in the Program must sell or lease a vehicle at the "Employee Purchase Price" listed on the factory invoice. TMSJ ¶ 8; "John Doe" Aff. ¶ 8; "Roe" Aff. ¶ 6; DMSJ ¶ 15.

7. The factory invoice is "Champion's" invoice to a dealer. The factory invoice is not available to a regular customer. "John Doe" Aff. ¶ 9; "Roe" Aff. ¶ 7; DMSJ ¶ 15.

8. The factory invoice always contains a price line item designated with the letters "EP", which item states the price that must be used by the dealer for a sale to an eligible customer pursuant to the Program. "John Doe" Aff. ¶ 10; "Roe" Aff. ¶ 8; DMSJ ¶ 15.

9. An eligible purchaser/lessee cannot negotiate the "Employee Purchase Price" with a dealer. "John Doe" Aff. ¶ 11; "Roe" Aff. ¶ 9; DMSJ ¶ 15.

10. A participating dealer may not charge an eligible purchaser/lessee for any preparation fee, documentation fee, delivery and handling charges, service or overhead fees, or any other such delivery fees. "John Doe" Aff. ¶ 12; "Roe" Aff. ¶ 10; DMSJ ¶ 15.

11. After a participating dealer makes a sale under the Program, it receives from "Champion" a payment equal to six percent (6%) of the Employee Purchase Price amount, plus $75. "Roe" Aff. ¶ 12; DMSJ ¶ 15. "Apex" received such Program payments for each eligible Program sale it made during the audit period. TMSJ ¶ 11; "John Doe" Aff. ¶ 14; DMSJ ¶ 15.

12. "Champion's" Program payments are processed by electronic funds transfer or as a reduction in the amount the dealer owes "Champion" as listed on the monthly dealer parts account. "Roe" Aff. ¶ 17; DMSJ ¶ 15.

15. At the time that a dealer purchases a vehicle from "Champion", neither the dealer nor "Champion" is able to determine if the vehicle will be sold under the Program. TMSJ ¶¶ 9-10; "John Doe" Aff. ¶ 15; "Roe" Aff.¶ 13; DMSJ ¶ 15.

19. Generally speaking, only those "Champion" employees who administer the Program, or provide counsel regarding the Program, have knowledge of the payments or credits to dealers under the Program. "Roe" Aff. ¶ 20; DMSJ ¶ 15.

20. "Apex" did not include the "Champion" Program payments or credits within the amount of gross receipts it reported on the Illinois Sales and Use Tax Returns it filed for the months of January 1996 through September 1998. "John Doe" Aff. ¶ 21; DMSJ ¶ 15.

21. "Champion" employees/retirees and their family members who purchase vehicles pursuant to the Program, in addition to the reduced purchase price provided by the Program, still receive any and all consumer rebates that may be available to the general public at the time of the vehicle purchase. Examples of such rebates include, but are not limited to, special financing arrangements or cash rebates. "Roe" Aff. ¶ 23; DMSJ ¶ 15.

23. Following an audit, the Department determined that "Apex" should have treated the amounts of "Champion's" Program payments or credits as taxable gross receipts on the returns it filed during the audit period. TMSJ ¶ 14; DMSJ, Ex. 1 thereto (exhibit 1 is the Department's correction of "Apex's" returns, under the certificate of the Director).

**B. Facts In Dispute**

Notwithstanding the above, I determine that the ALJ's finding number thirteen is in actuality a conclusion of law rather than a "fact," and I also disagree with the ALJ that finding of fact number fourteen was not disputed by the Department. As such, I do not concur with the ALJ that "facts" thirteen and fourteen form a basis for granting summary judgment to "Apex" in this case.

Finding of Fact thirteen reads as follows:

> "Champion's" payments or credits to dealers, as part of the Program, is a means by which "Champion" reduces the price that it charges a dealer for a vehicle sold under the Program. TMSJ ¶ 12; "Roe" Aff. ¶ 14; DMSJ ¶ 15.

¶ 14 of "Richard Roe's" affidavit, submitted as part of "Apex's" Motion, and which is the basis for fact thirteen states: "The payment by "Champion" to dealers as part of the Program is a means by

which "Champion" reduces the price that it charges a dealer for a vehicle sold under the Program." As stated above, the issue in controversy in this case is whether payments received by "Apex" from "Champion" are "gross receipts" and subject to ROT. "Roe's" statement that the payments are "a means by which "Champion" reduces the price that it charges a dealer" is framed as if it were a fact. However, the statement actually addresses the ultimate legal issue in controversy in this case, and as such, is not a "fact," but rather a conclusion.

This distinction was recognized by the Department in its "Cross-Motion for Summary Judgment" which states: "Furthermore, the issue of whether the payments made to Taxpayer from "Champion" qualify as gross receipts under the ROT Act, is a question of law." (Dept. Motion For Summary Judgment, ¶ 16). This statement by the Department was overlooked by the ALJ in his Recommended Order. Affidavits in support of a motion for summary judgment must contain evidentiary facts, not conclusions, to which the affiant would be competent to testify at trial. Taylor v. City of Beardstown, 142 Ill. App. 3d 584, (4th Dist. 1986). On a motion for summary judgment, the trial court is correct to strike those portions of affidavits which are mere conclusions instead of facts admissible in evidence. Murphy v. Urso, 88 Ill. 2d 444 (1981). Conclusions, unsupported by facts admissible in evidence, do not create a genuine material issue of fact. Greenberg v. Goodman, 52 Ill. App. 3d 258 (1st Dist. 1977).

Finding of Fact fourteen reads as follows:

> Consistent with the purpose for which they are given, "Apex" treats the Program payment from "Champion" as a reduction in its cost of goods sold on its general ledger. TMJS ¶ 15; "John Doe" Aff. ¶ 20; DMSJ ¶ 15.

"John Doe's" affidavit, submitted as part of "Apex's" Motion, states at ¶ 20: "For general ledger purposes, "Apex" treats the payment from "Champion" as a reduction in its cost of goods sold. "Apex", however, treats general consumer rebates as a receipt from the sale of an automobile."

In paragraph nineteen of the Department's "Cross Motion for Summary Judgment," the Department, "incorporated herein its Memorandum in Support of the Department's Motion for Summary Judgment..." The Department's "Memorandum in Support" states at page 3:

> The Department notes one exception to Taxpayer's facts, which is the characterization of the payments as reductions in the price that the Manufacturer charges Taxpayer for a vehicle sold under the Program. The Department does not dispute the fact that the Taxpayer, for accounting purposes, treats the Manufacturer payments as a debit and credit to costs of good sold. However, how Taxpayer utilizes this fact in its Memorandum and Motion is irrelevant for ROT purposes and somewhat misleading.

It is clear from the Department's remarks here that it is not disputing the "fact" that "Apex" treats program payments received from "Champion" as reductions in "Apex's" cost of goods sold for general ledger purposes. However, "Apex's" characterization of the payments as a reduction in cost of goods sold for general ledger purposes is not conclusive or dispositive of the issue in controversy in this case. Although the Department does not dispute "Apex's" accounting treatment, it does take "exception" that the accounting treatment is legally determinative of the treatment for ROT purposes. As the Department points out, "Apex's" accounting treatment of the payments is "irrelevant for ROT purposes."

The ALJ refers to ¶ 14 of "Roe's" affidavit and ¶ 20 of "John Doe's" affidavit and states: "Apex's" motion includes statements of fact by an employee/agent of each party to the sales and service agreement as to the parties' intent and treatment of monies or credits passed from "Champion" to "Apex" pursuant to the Program. There is no dispute regarding those material facts, since the Department expressly adopted and incorporated them as part of its Motion." Recommended Order, p. 11.

According to the ALJ, the "fundamental conflict between the parties' motions" is that the Department expressly incorporated "Apex's" facts into its Motion [but] "the Department simply

refuses to treat the Program payments as what they are --- a discount or reduction of the amount of the consideration that "Apex", the retailer/purchaser, owes or has paid to "Champion", the manufacturing/seller, regarding its purchase of goods for resale." The ALJ continues: "'Apex' has presented sworn affidavits of competent persons with personal knowledge of the facts surrounding the Program, and those persons have included well-pleaded facts within their affidavits. Those affidavits articulate precisely what "Champion's" Program payments are, and the Department expressly adopted those facts and incorporated them into its Motion." Recommended Order, pp. 15-16.

The conclusions drawn in the above paragraph are unwarranted and are not a valid basis for granting "Apex's" motion for summary judgment. First, the statement by "Roe" in ¶ 14 of his affidavit, incorporated by "Apex" into its motion, regarding "Champion's" treatment of the payments "as a means" by which "Champion" reduces the price that it charges a dealer, is not a "well-pleaded fact," but is instead a legal conclusion. The statement does not "articulate precisely what "Champion's" Program payments are," as suggested in the Recommended Order. Rather, the statement articulates "Champion's" current treatment of the payments, a treatment the Department obviously disagreed with and which forms the central issue in controversy in this case. The ALJ reasons that even if the Department did not expressly adopt the well-pleaded facts set forth in the affidavits incorporated as part of "Apex's" Motion, "those facts are admitted by operation of law, since they are not contradicted by any counter-affidavits offered by the Department." Purtill v. Hess, 111 Ill. 2d 229 (1986). Recommended Order, p. 11. However, failure of a party opposing a motion for summary judgments to file counter-affidavits does not mean that the motion is to be automatically granted. Rather it means that all the facts, as distinguished from conclusions, in the movant's affidavits are uncontradicted and must be accepted as true for purposes of the motion.

Barber-Colman v. A & K Midwest Ins. Co., 236 Ill.App.3d 1065 (5th Dist. 1992). Since finding number thirteen is a legal conclusion, not a fact, counter-affidavits were not required from the Department to dispute them. It follows then that a conclusion of law cannot be a basis for granting "Apex's" Motion.

Second, the ALJ concluded that the Department adopted and incorporated finding of fact fourteen into its Cross-Motion. However, the Department's "exception" to fact fourteen indicates that the Department only accepted as "fact" "Apex's" accounting treatment of the payments as a reduction in cost of goods sold, but did not accept as "fact" that this accounting treatment was legally determinative of the treatment for ROT purposes. The ALJ's reliance on finding fourteen as being "what "Champion's" program payments are," and his castigation of the Department's refusal to accept that as fact simply overlooks the Department's position that "Apex's" accounting treatment of the Program payments does not determine what the payments actually are for ROT purposes.

**CONCLUSIONS OF LAW**:

**A. The Retailers' Occupation Tax Act and Department regulations define "gross receipts" to include all consideration received by the seller.**

Section 120/1 of the Retailers' Occupation Tax Act contains the following definition of "gross receipts:"

> "Gross Receipts" from the sale of tangible personal property at retail means the total selling price or the amount of such sales, as hereinbefore defined. 35 ILCS 120/1.

The term "selling price" referred to and used in the above definition of "gross receipts" is defined as follows:

> "Selling price" or the "amount of sale" means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property, other than hereinafter provided,

and services … , 35 ILCS 120/1.

The Department, in its own Regulations, further clarified the definition of "gross receipts" as follows:

> "Gross receipts" means all the consideration actually received by the seller, except traded-in tangible personal property. 86 Ill. Admin. Code § 130.401.

It is clear from a plain reading of the above definitions that the Illinois General Assembly intended that all compensation received by a seller, including payments from third parties, be included in "gross receipts." "Gross receipts" as defined in 35 ILCS 120/1 means "the total selling price" (emphasis added). The use of the word "total" here is certainly an indication that the General Assembly meant to include all consideration without limitation as to whether it was from one or more sources. Likewise, the General Assembly did not limit "gross receipts" in 35 ILCS 120/1 to compensation agreed to or paid only by the purchaser.

Additionally, 35 ILCS 120/1 defines "selling price" to mean the "consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property… and service…" The definition does not require that the "cash, credits, property and service" be received solely from the purchaser. The only requirement of the definition is that the consideration be "received in money or otherwise" by the seller, without any limitation placed on whom or what source the consideration may be received.

Further, the Department's regulations, which define "gross receipts," to include "all consideration actually received by the seller," reflect the legislative intent and do not require that the consideration be agreed to or known to the purchaser (emphasis added). 86 Ill. Admin. Code § 130.401. Again, the only requirement of this definition is that the "consideration" be received "by the seller." It is also noted that in the Department's regulations, "gross receipts" include "all

consideration” (emphasis added), again indicating that the General Assembly did not limit seller’s receipt of consideration from more than one source.

"Apex" contends and the ALJ agrees that the definitions of “selling price” and “gross receipts” should be read to include only the consideration that passes from the vehicle purchaser to "Apex". Accordingly, the definitions would not include as consideration the Program payments from "Champion" to "Apex". However, as discussed, the definitions above do not support this interpretation. “Gross receipts” includes “all consideration” and there is obviously no requirement that the consideration included in the definition be limited to one source.

In accordance with the above definitions, the “total selling price” “means the consideration for a sale valued in money.” In the case in controversy, the “total selling price” would consist of the price that an employee paid "Apex" for a vehicle plus the payments made by "Champion" to "Apex". For example, if an employee paid "Apex" a preset price for a vehicle of $20,000, "Apex" also receives a 6% payment, or $1,200, plus $75 from "Champion". The “total selling price” is $21,275, of which $20,000 is paid by the employee and $1,275 is paid by "Champion". “Gross receipts” subject to ROT means the “total selling price” which is $21,275. “Gross receipts” as defined by the Department’s regulations “means all consideration actually received by the seller.” “All consideration” actually received by the seller for this specific sale is $21,275. Of “all consideration” actually received by the seller, the employee has tendered $20,000.

The ALJ reasons that “consideration” as used in the statutes and regulations includes only the consideration paid by the *purchaser* “to acquire the tangible personal property that is the subject of the ‘sale at retail.’ ” Recommended Order, p. 22. Following this path, he concludes the payment that "Apex" receives from "Champion" is not part of the consideration for the sale. In support of this position, the ALJ cites the definition of “sale at retail” which includes the transfer of personal

property to a purchaser … "for a valuable consideration." 35 ILCS 120/1. "The word 'consideration' is next used in the definition of a 'purchaser,' which the legislature said 'means anyone who, through a sale at retail, acquires the ownership or title to tangible personal property for a valuable consideration." Recommended Order, p. 21. The ALJ then notes that the legislature defined "selling price" and "amount of sale" as "the consideration for a sale valued in money." 35 ILCS 120/1. *Ergo*, it is "reasonable, if not inescapable," to conclude that the word "consideration" that constitutes a retailer's "selling price" or "amount of sale" is the same "valuable consideration" that a purchaser tenders to a retailer to acquire the tangible personal property that is the subject of the sale at retail. Recommended Order, p. 21.

This conclusion is not supported by statute. Although a "sale at retail" requires a transfer of ownership or title from a retailer to a purchaser for "valuable consideration," the statute does not require or demand that the valuable consideration be received only from the purchaser. The legislature defined "purchaser," as anyone who acquires ownership or title to tangible personal property for a valuable consideration, but the definition does not require or otherwise mandate that valuable consideration be paid only by the purchaser.

The abject flaw of the ALJ's conclusion is seen in the following example: If a parent purchases an automobile for an adult child who then takes title to the car, a "sale at retail" has occurred because ownership has been transferred to a purchaser for a valuable consideration. The statute defines purchaser as anyone who acquires ownership or title for a valuable consideration and in this example, the child is the purchaser because he acquires title. However, the "valuable consideration" here was not paid by the child. Accepting the ALJ's interpretation of the statute, this sale would apparently not be subject to retailer's occupation tax, because the consideration was paid by someone other than the purchaser.

The other definitions discussed by the ALJ do not limit consideration to that received only from a purchaser. "Gross receipts" is defined in the statute as "total selling price." "Selling price" means "the consideration for a sale." The focus of the definitions is on how much consideration a seller receives from a particular sale. This consideration may consist of, and in many cases may total, the consideration tendered by the purchaser. However, the definitions cannot be read to require that consideration be limited to that tendered by the purchaser. The use of the word "total" in 35 ILCS 120/1 and "all" in the Department's definition of "gross receipts" would have no meaning or significance if consideration was limited to that received only from the purchaser, as is suggested here. It is a basic premise of statutory construction that all words used in a statute be considered in an interpretation of the provision, and it is improper to read out of or otherwise render meaningless any statutory words.

As the Department argues in its "Cross Motion for Summary Judgment," the statutory scheme encompasses a situation where a purchaser presents a manufacturer's coupon to a seller. This coupon reduces the price paid by the purchaser, and the manufacturer reimburses the seller for the discount. The "total selling price" subject to ROT then includes the amount that the purchaser actually paid plus the amount of the proceeds received by the seller from the manufacturer. The "gross receipts," which "means all the consideration actually received by the seller," subject to ROT, include the amount paid to the seller from the purchaser and the amount paid to the seller from the manufacturer. "All the consideration received by the seller" is received from two sources, the purchaser and the manufacturer. 86 Ill. Admin. Code § 130.401.

"Apex" argues that the treatment of coupons for ROT purposes is not analogous because the vehicle purchaser in "Apex", unlike the coupon presenter, is not aware that a third party is reimbursing the seller. However, the definitions above do not require that "gross receipts" be

limited to those amounts known by the purchaser, nor does the statutory definition of "selling price" require that the purchaser know of all "cash, credits, property or services…" before it is subject to ROT. Likewise, in the regulatory definition of "gross receipts," there is no requirement that the consideration be agreed to and known by the purchaser. Since the tax is on the retailer, the focus of the statute and regulatory definitions rest upon the total consideration actually *received by a seller* (not paid by the purchaser) in a transaction in order to determine "gross receipts". This, in turn, becomes the measuring stick by which the tax is applied. The definitions are not concerned with the source of the consideration or whether the parties to the transaction have knowledge of it.

B. **Keystone Chevrolet v. Kirk, 69 Ill. 2d 483 (1978) does not support "Apex's" argument that "consideration" is limited to the transaction between a seller and a purchaser**.

"Apex's" arguments notwithstanding, the Illinois Supreme Court case of Keystone Chevrolet v. Kirk, 69 Ill. 2d 483 (1978) supports the Department's position in this controversy more than it does the taxpayer. The facts in Keystone are as follows: A consumer purchased an automobile for $4,800, plus tax of $240. The consumer paid this amount to the dealer, Keystone. The consumer then received a $500 rebate from the manufacturer, thereby reducing the consumer's actual sales price to $4,300, on which a tax of $215 would be payable. *Id.* at 485. Keystone sought a declaration that its ROT liability was $215, reflecting the rebate paid by the manufacturer to the consumer, rather than the $240, which was the amount actually received by the seller. The Illinois Supreme Court held that tax was properly due on the amount actually tendered by the consumer to Keystone ($4,800) and not on the reduced price resulting from the rebate ($4,300). *Id*. at 487.

According to the ALJ, "Keystone, stands for the proposition that ROT must be measured by the amount of valuable consideration that is passed from the purchaser to the seller for the tangible personal property sold at retail, even if the purchaser subsequently recovers some of that

consideration from the manufacturer after the purchase." Recommended Order, p. 26. Such interpretation of Keystone is misguided in that it focuses on consideration passed from the purchaser to the seller. However, the Court did not hold that ROT must be measured by the amount of "valuable consideration" passed from the purchaser to the seller. Instead, the Court held that since the tax is imposed on the *seller's* gross receipts, the fact that the consumer received a rebate from the manufacturer did not entitle the seller to deduct the rebate from its gross receipts for purposes of determining the amount of ROT owed:

> This argument ignores the taxation scheme provided in the Act. It is the retailer who is taxed, not the purchaser, and the retailer has the legal obligation to pay the tax whether or not he collects it from the purchaser. *Id*. at 487.

Moreover, the court in Keystone rejected the plaintiff's argument that the retailer's selling price must be determined "by looking through the eyes of the purchaser," an argument similar to that advanced by "Apex". Recommended Order, p. 26. The Supreme Court focused specifically on what the seller received from the sale, stating that "[S]ection 2 imposes the tax specifically upon the *seller's* gross receipts. Where those amounts are not in any way reduced, the full amount thereof is subject to the tax." *Id.* at 487. (emphasis added). The Court continued: "[The manufacturer's rebate] neither changes the character of the transaction between the seller and purchaser nor affects the liability of the retailer to pay a tax computed on the basis of the amount received by him." *Id*. at 488. (emphasis added).

A correct interpretation of Keystone is that if a rebate is paid by a third party, and the rebate is not tendered to the seller, then the rebate will not be included in the seller's gross receipts. The Court stated: "We find nothing in the Act or regulations, however, permitting a seller to deduct from his gross receipts an amount paid by a third party directly to the purchaser." *Id*. at. 487.

(emphasis added). What is clear from the Supreme Court's decision, and what is relevant to the matter currently at issue, is that "selling price" is not determined by looking through the eyes of the purchaser, but by focusing on what the seller receives from a sale.

**C. All the consideration that a seller receives shall be included in its taxable gross receipts, if all the consideration received is directly related to a particular sale.**

Chet's Vending Service, Inc. v. The Department of Revenue, 71 Ill. 2d 38 (1978) supports the position that a seller's "gross receipts" may include both money from a purchaser and money from a third party as long as both monies are tied to a particular sale. In Chet's, the plaintiff had different types of contracts which it used with various employers to supply vending machine and manual food service to their employees. Under one type of contract, the plaintiff paid its ROT liability on all money received from the sale of food to employees, but, in addition to the receipts from sales, it received a "fixed fee" or monthly subsidy payment from the employer. Under another type of contract, the plaintiff, each month, submitted to the employer a statement of its sales and costs at the employer's plant, and if the receipts from sales to employees did not cover the plaintiff's costs, the employer made up the difference (the "guarantee payment"). In computing its ROT, the plaintiff did not include in its gross receipts either the "fixed fee" or the "guarantee payment". The question presented was whether either of these payments, paid by the third party employer, were subject to ROT. *Id.* at 40.

In Chet's, the Department contended that the fixed fees and the guarantee payments paid by the employer were an "inseparable part of the consideration for the sale" and includable in Chet's gross receipts subject to ROT. The Department argued that the payment arrangement represented a "two-party split" of the consideration between the employer and the employee and that the payments received from both must be combined in computing ROT. *Id.* at 41-42.

The plaintiff in Chet's argued that the employees were the "purchasers" of the food manually sold, that the "selling price" was the consideration received from such sales and that its "gross receipts" were the total receipts from sales made through its vending machines and manual operations. The plaintiff argued further that the revenues received from the employer were not paid by the "purchaser" and did not constitute any part of the "selling price" or "gross receipts." The plaintiff contended that "the sums paid by the employer do not relate to any particular item sold by Chet to the employees, and that the payments should not be included in "gross receipts." *Id.* at 41.

The Illinois Supreme Court held that the fixed and guaranteed payments by the employer were not subject to ROT because they were not tied to any particular sale. The Court stated that "the evidence shows no basis for relating any portion of the fixed fee or guaranteed payment to any individual sale as part of the selling price." *Id*. at 42. The reasonable and obvious inference that can be derived from the Court's statement is that if the fixed fee or guaranteed payment could be related to any individual sale, the payment from the employer would then be included in "gross receipts" and thus made taxable under the ROT.

The Program payments made by "Champion" to "Apex" are identified with and pertain to particular vehicle sales. "Champion" makes a set payment to "Apex" that is equal to 6% of the selling price of a vehicle plus $75. This payment by "Champion" is contingent on the sale of a specific, identifiable vehicle, sold to a specific type of customer. Further, the price of each vehicle, if sold to a specific type of customer, is set by "Champion", without negotiation with "Apex". "Champion"'s payments, therefore, are directly related to and identified with individual vehicle sales.

Moreover, at the exact moment that a sale is made by "Apex" to a "Champion" employee, "Apex" is aware of the exact price it must charge that customer and that it will be receiving an

additional 6% of the selling price plus $75 from "Champion". This factor was not considered by the Supreme Court in Chet's. It is unclear whether the plaintiff knew the dollar amount of the "fixed fee" when it sold the food and beverage under the first type of contract. Under the "guaranteed payment" arrangement in Chet's, the plaintiff was definitely not aware of what the employer's payment would be until he determined that his receipts did not cover his costs, at which time the employer "makes up the difference." *Id*. at 40. Under the "guaranteed plan," there would be no monthly payment by the employer if receipts equaled or exceeded costs.

The Court stated in Chet's that the evidence showed no basis for relating any portion of the fixed fee or guaranteed payment to any individual sale. The situation is exactly the opposite in the case before me where the fact that "Champion" will be making a payment to "Apex" and the exact dollar amount of the payment are known immediately upon the sale of the identifiable vehicle.

The ALJ writes in his Recommended Order that Chet's was decided the way it was because the court focused on (1) who the actual parties to the sale at retail were; and (2) what was the amount of the consideration that the purchasers actually paid to the retailer to acquire the property for use or consumption. Recommended Order, p. 18. It is posed that "the court in Chet's refused to accept the Department's argument that a third party's payments to the retailer, pursuant to the agreement between them, should be considered part of the 'selling price' or 'amount of sale' that the retailer actually received from the 'purchasers' who were the other parties to the 'sale at retail.' " Recommended Order, p. 19.

This position is only partially correct. The Court in Chet's refused to accept the Department's argument that a third party's payments to a retailer should be considered part of the "selling price," unless the payments could be identified with the sale of a particular item. On the other hand, the Court did not state that a third party could not be a party to a sale. Indeed, the case

must be read to infer that a third party is a party to a sale if the third party's payments to the retailer can be identified with the sale of a particular item.

Secondly, if the court truly focused on the amount of consideration, as the ALJ suggests, it focused on the amount of consideration that could be identified with the sale of the particular item. As mentioned previously, the employer's payments in Chet's were in the nature of a "monthly subsidy payment" or a "guaranteed payment." The fact that the plaintiff in Chet's was selling food and beverages presents the obvious problem that the "monthly subsidy payment" and the "guaranteed payment" by the employer could never be identified with any individual item of food or beverage sold. This is obviously not the situation with "Champion" where the fact that "Champion" will be making a payment and the exact dollar amount of the payment is known immediately upon a specific sale of a vehicle to a "Champion" employee.

**D. "Apex's" accounting treatment of the Program payments is not relevant for purposes of the Retailers' Occupation Act.**

It must also be noted that in Chet's, the Supreme Court found that the employer's reason for making the payments and the plaintiff's accounting treatment of the payments were "wholly irrelevant." "We have considered the arguments of the parties concerning the nature of the payments and conclude that whether the payments were made for the purpose of enabling plaintiff to reduce the cost of the food and beverages which it sells to the employees or to guarantee it a profit from its operations is wholly irrelevant." *Id*. at 42-43. This sentence by the Supreme Court illustrates that a taxpayer cannot escape paying ROT on the total amount it receives for a sale because it chooses on its own volition to account for a manufacturer's payment as a reduction in cost. To find otherwise would render the ROT Act meaningless, because sellers would control what their taxable gross receipts are by adopting an accounting method similar to "Apex's" in the case at issue here. The ROT Act is concerned with what a seller receives for a particular sale as

long as the money can be identified with a particular transaction. *Id*. at 42. How a taxpayer accounts for the money received by or paid to it is of no legal or factual consequence, i.e. it is "wholly irrelevant".

In his Recommended Order, the ALJ incorrectly allowed "Champion" and "Apex's" accounting treatment of the Program payments to determine what the payments actually were for ROT purposes. The ALJ concludes that "these Program payments or credits are not receivables to "Apex"; rather, they are a portion of "Champion"'s receivables from its sales for resale to "Apex", which portion "Champion" has agreed to refund or credit to "Apex" for each Program sale." "Put another way, the Program payments or credits represent the amount by which "Champion" discounted or reduced "Apex's" purchase price for the goods that "Apex" purchased for resale, and sold at retail to an eligible Program purchaser." Recommended Order, p. 15.

One of "Champion's" payment methods is by electronic fund transfer, that is, "Champion" directly sends to "Apex" its payment for the vehicle sold. "Champion" can also effectuate its payment to "Apex" by reducing, by the amount it owes to "Apex", "Apex's" monthly liability to it for "Apex's" purchase of parts.

"Apex" has a valid sales and service agreement with "Champion" which allows "Apex" to participate in the "Employee/Retiree New Vehicle Purchase/Lease Program." (Finding of Fact Nos. 4 and 5). This agreement between "Apex" and "Champion", and any accounting treatment chosen by the parties to reflect this agreement, have no relevance for purposes of the Retailer's Occupation Tax Act. The Program payments, whether made by a reduction in "Apex's" monthly invoice amount or by electronic fund transfer, are simply a reflection of "Champion's" debt to "Apex" under the sales and service agreement for a particular car sale. The method of payment reflects the balancing of intercompany accounts and the settlement of "Champion's" debt to "Apex" for the sale

of a vehicle under the Program. The method of payment and "Apex's" election to treat the payment or credit as a reduction in the cost of the vehicle has no relevance for retailer's occupation tax purposes. Similarly, "Champion's" interpretation of Internal Revenue Code regulations for accounting for fringe benefits to employees has no bearing on whether the Program payments are includable in gross receipts.[1] As the Supreme Court noted in Chet's, the accounting treatment of the payments is "wholly irrelevant" for purposes of determining whether the payments are taxable under the Retailers' Occupation Tax Act.

**E. "Gross Receipts" are not restricted to compensation known or agreed to by the purchaser.**

The Department argues that with both Chet's and "Apex", the retailer received two considerations --"the consideration from the employee and the consideration from the employer:"

> [In "Apex",] the consideration between the employee and the Taxpayer is the Taxpayer's agreement to give up its interest in a vehicle, in exchange for the employee's payment (or promise of payment) for its interest in the car. The consideration between the Taxpayer and the Manufacturer, is the Taxpayer agreement with the Manufacturer to sell a car that the Taxpayer owns to a qualified employee at a reduced price, and for agreeing to do so, the Manufacturer will pay the Taxpayer 6% and $75 for each car sold. Therefore, when a vehicle is sold to an employee under the Program, the Taxpayer receives consideration (money) from the employee, and it also receives consideration (money) from the manufacturer, and because the Manufacturer payments are directly related to a particular sale, the Manufacturer payment should be included in Taxpayer's gross receipts.
> Department's Reply, p. 6.

In his Recommended Order, the ALJ discounts what he calls the Department's "transferred consideration" approach. He contends that "Champion's" consideration in its service and sales agreement with "Apex" is, *inter alia*, its promise to reduce the cost price of each vehicle "Apex"

[1] Pursuant to "Champion's" interpretation of Section 132 of the Internal Revenue Code (26 USC § 132), "Champion" does not treat the Program payments as wages or gross income for federal income tax purposes and does not report the payments to the Internal Revenue Service or withhold tax on a Form W-2 or Form 1099. "Roe" Aff. § 25.

sells to an eligible purchaser at retail. He adds that most eligible purchasers do not even know about "Champion's" promise to pay "Apex" if a vehicle is sold under the Program. "How can "Champion's" performance of its promise be part of the consideration a purchaser pays to 'Apex' if the purchaser does not even know about the promise?" Recommended Order, p. 20.

That determination overlooks several important points. First, as discussed previously, the definitions of "gross receipts" in 35 ILCS 120/1 and 86 Ill. Admin. Code § 130.401 do not require that the purchaser be aware of the consideration received by the seller. This is a condition suggested in the Recommended Order that simply does not exist in law. "Gross receipts means all consideration actually received by the seller…" 86 Ill. Admin Code § 130.401. There are no other limitations or contingencies either stated or implied. The definitions are structured in terms of what the seller receives. In this regard, at the time that "Apex" sells a vehicle to a "Champion" employee, "Apex" knows exactly what its gross receipts will be. At the time of sale, "Apex" knows that it will receive the predetermined special invoice price from the employee, and "Apex" also knows it will receive the 6% payment plus $75 from "Champion". The fact that an employee may not know of the total consideration at the time of purchase is manifestly inconsequential for determining the correct ROT due. What is relevant for ROT purposes is the gross receipts received by the seller. To this end, "Apex" knows exactly what its gross receipts will be at the time the sale is made.

**F. "Champion" is a party to "Apex's" sales at retail to qualified employees.**

It is noted in the Recommended Order that in a bilateral agreement, such as the sales and service agreement between "Champion" and "Apex", or such as the agreement for the sale at retail between "Apex" and a purchaser, both sides to each agreement ordinarily exchange a set of promises. Each party's set of promises constitutes his consideration for the agreement. Nathan v. Leopold, 108 Ill. App. 2d 160 (1st Dist. 1969). For a bilateral contract to be enforceable, there must

be adequate consideration exchanged by each party. Steinberg v. Chicago Medical School., 69 Ill. 2d 320 (1969). The recommendation then adds that "Champion" is not a party to "Apex's" sale at retail and "Champion's" consideration to "Apex" is not "part of the consideration that is exchanged between the parties at retail." Recommended Order, p. 20.

With all due respect to the ALJ's analysis, this presentation totally ignores the reality of the sale to a "Champion" employee. "Apex" agrees to sell or lease the vehicle at the "Employee Purchase Price" listed on the factory invoice (Finding of Fact No. 6), a price preset by "Champion". The factory invoice is "Champion's" invoice to a dealer. (Finding of Fact No. 7). An eligible employee cannot negotiate the 'Employee Purchase Price'. (Finding of Fact No. 9). "A participating dealer may not charge an eligible purchaser/lessee for any preparation fee, documentation fee, delivery and handling charges, service or overhead fee, or any other such delivery fees." (Finding of Fact No. 10).

The ALJ concludes that "Champion" is not a party to "Apex's" sale at retail even though "Champion" has preset, for "Apex" and the "Champion" employees, the purchase price as well as all other key revenue generating factors of the vehicle. If "Apex" wishes to participate in the Program at all, it must sell the vehicle at the price set by "Champion" and under terms dictated by "Champion". The Recommended Order concludes that "Champion" is not a party to "Apex's" sale at retail even though the employee agrees with "Champion", its employer, that it will not negotiate a selling price with "Apex". It concludes that "Champion" is not a party to "Apex's" sale at retail even though "Champion" will not allow "Apex" to charge an employee for any handling charges or additional costs incurred in the course of the sale. In spite of the above, the ALJ concludes that "Champion's" preset consideration to "Apex" is not part of the consideration that is "exchanged" between "Apex" and the employee.

It does not appear that the concept of “exchange” is even appropriate here when neither "Apex" nor the employee can negotiate a preset purchase price. If there is a true “exchange,” then "Apex" is exchanging a vehicle for consideration received from the employee and for consideration received from "Champion" as, obviously, "Apex" sells the vehicle knowing about, relying on, and including as part of the “exchange” the payment received from "Champion". In real effect, "Champion" is providing a portion of the qualified employees’ sales price.

The test under the ROT Act for determining “gross receipts” is what the seller receives as “consideration” for a sale at retail. “All the consideration” that the seller receives from a particular sale is subject to ROT. 35 ILCS 120/1 and 86 Ill. Adm. Code § 130.401. The ALJ proposes that there is no difference between "Champion’s" payments to "Apex" and “volume discounts” and “prompt payment” discounts offered by manufacturers to retailers. “If the monetary value of discounts that are part of agreements between wholesalers and retailers can be transferred to become part of the consideration a purchaser gives a retailer to acquire goods during a sale at retail, nothing would stop an enterprising Department auditor from correcting any retailer’s monthly returns and assessing tax measured by whatever discounts a retailer may have received from a wholesaler, and then tying a prorata amount of such discounts to the ‘gross receipts’ the retailer received from purchasers to acquire the goods sold at retail.” Recommended Order, p. 24.

The ALJ's recommendation overlooks the fact that there are several differences between the Program payments *vis-à-vis* volume and prompt payment discounts. Volume and prompt payment discounts are taken at the time of purchase of a product <u>for resale</u>, and it is within "Apex’s" control whether it takes these discounts. "Apex’s" decision may depend on the volume "Apex" is able to purchase and "Apex’s" cash flow, but these are factors within "Apex’s" control. On the other hand, the sales and service agreement between "Apex" and "Champion" requires "Apex" to sell a car at a

particular price to a particular customer. If the sale is made, the Program payments, at 6% of the purchase price plus $75, are not under "Apex's" control. Second, "Apex" does not conduct its business relying on the prompt payment or volume discounts. These discounts are not taken into consideration by "Apex" in setting the purchase price of the vehicles sold under the Program since the "Employee Purchase Price" is listed on the factory invoice. However, at the time that "Apex" sells a vehicle to a qualified employee, it is aware of and can rely on the fact that it will receive 6% of the purchase price plus $75 from "Champion" as part of the purchase price for the vehicle. "Apex" depends on these Program payments as part of the purchase price, and these payments are an integral and definite part of "Apex's" particular sale for retail.

The Recommended Order also fails to recognize that if a manufacturer's payment to a retailer is not considered part of the sale, it allows a manufacturer to design transactions so that a seller's ROT would be reduced or eliminated. The dissent in Chet's recognized this:

> The court's opinion permits an employer to enter into an agreement with a caterer whereby the caterer would sell employees food and drink at a very low price provided the employer pays a substantial subsidy, thus escaping the retailers occupation tax on most of the consideration for the sale. Any third party with an interest in having goods transferred to others would use this device as a means of eliminating or substantially reducing the tax. Clearly, neither the intent nor the language of the Retailers' Occupation Tax Act permits this result." Chet's at 43.

The dissent in Chet's characterized the "intent" or "language" of the ROT Act to include all consideration, regardless of whether it could be identified with a particular sale. The dissent noted that without the subsidies and guarantees in Chet's, the plaintiff would not have provided the food and beverages. "The conclusion that they are part of the 'consideration for a sale' and therefore a part of the 'gross receipts from such sales of personal property' seems to me inescapable." *Id*. at 44.

On the other hand, the majority in Chet's characterized the "intent" or "language" of the ROT Act to include all consideration, as long as it could be identified with a particular sale. *Id*. at 42. Under either the majority's or the dissent's interpretation of the "intent" or "language" of the ROT Act, "Champion's" payments to "Apex" are subject to tax. To find otherwise would encourage taxpayers to make after-the-sale adjustments to their books in order to reduce or eliminate ROT.

**G. The Department's Letter Rulings, while not binding on "Apex", have consistently held that manufacturer's payments are taxable gross receipts.**

The issues addressed above have also been addressed by the Department in Letter Rulings 89-0126, 94-0422 and 98-0020. With factual situations similar to "Apex's", the Letter Rulings have consistently ruled that ROT is measured by the total gross receipts received by the seller, and that manufacturer's credits paid to dealers pursuant to employee purchase programs are subject to ROT. The Letter Rulings focus on what the seller received from the transaction, regardless of whether the compensation came from a third party or whether the purchaser knew of the additional compensation.

In Letter Ruling 89-0126 (1989), a taxpayer inquired as to whether "cash rebates" offered by automobile manufacturers to dealers should be included in dealer's gross receipts, arguing that the cash rebates were "nothing more than a price reduction, but without a change in the sticker price." The Department ruled that because ROT is based upon the total gross receipts that are received by the retailer, money received by an automotive dealer from a manufacturer in a rebate program is subject to ROT. The Department noted that the source of a dealer's receipts "does not

affect the fact that they are includable in the base upon which the tax is calculated." The Department cited the Supreme Court case of Keystone in support of its ruling.

"Apex" makes a similar argument. It argues that the cash payment from "Champion" is used to reduce the price of the vehicle. As the Letter Ruling indicates, and what is important to note here, *a taxpayer's accounting treatment of the payments is irrelevant in calculating ROT*. ROT is based on the "total gross receipts" that the dealer receives, and the source of these receipts does not affect the fact that the receipts are taxable. The Department, pursuant to the ROT Act, its regulations, and Keystone simply looks to what the seller receives from the sale.

In Letter Ruling 94-0422 (1994), a taxpayer requested clarification of the Department's policy concerning the tax treatment of commissions paid to dealers. According to the taxpayer, many manufacturers utilize programs which allow their employees to purchase new vehicles from their franchised dealers at discounted prices. "Subsequent to the sale of the new vehicle by the dealer to the factory employee, the factory pays a commission to the dealer for participation in the discount plan." The Department advised that the commissions are taxable, noting that "gross receipts are defined as all the consideration actually received by the seller" (emphasis added). The Department noted that if a seller receives a reimbursement or rebate for a discount given to a purchaser, the amount of that reimbursement or rebate is considered part of the gross receipts by the seller, and fully taxable. An example would be where a dealer sells a vehicle for $15,000 with a $1,000 discount either rebated or reimbursed from the manufacturer. "The dealer's commission … is another form of rebate or reimbursement for the discount given to the manufacturer's employees and is fully subject to Retailers' Occupation Tax."

Letter Ruling 98-0020 (1998) concerned an employee purchase program similar to "Apex's". Employees purchased new vehicles at wholesale prices and the factory paid the dealer a

fee for preparing and delivering the vehicle. A taxpayer argued that the fee was different from the reimbursement and rebates mentioned in Letter Ruling 94-0422 because the service fee that the factory pays the dealer "in no way affects the sales price charged to the customer." The taxpayer argued, similar to "Apex", that the payment of the service fee "is a separate transaction between the dealer and Company." The Department ruled that the service fee paid to the dealer for selling a vehicle pursuant to an employee purchase program is not distinguishable from rebates and reimbursements. The fees were compensation to the dealer for selling the vehicle at a reduced cost and for reimbursement of expenses normally passed onto the purchaser. The fees were "part of the dealers gross receipts from sales" and subject to ROT.

It is recognized that private letter rulings, other than establishing a consistency of approach to an issue, have little or no precedential impact upon this taxpayer. Container Corp. of America v. Wagner, 293 Ill. App. 3d 1089 (1st Dist. 1997). Accordingly, this "Final Administrative Decision" is based on the sections of the Retailers' Occupation Tax Act detailed above, and the Illinois Supreme Court cases interpreting that Act. The Act and the cases are sufficient to show that the payments from "Champion" to "Apex" are included in "gross receipts" and subject to ROT. The Letter Rulings are significant to the extent that they show that since 1989, the Department has unwaveringly found that payments from a manufacturer to a dealer were taxable under the ROT Act, in factual situations strikingly similar to "Apex's".

Finally, "Apex" argues in its "Response" that the issuance of the above Letter Rulings on the subject of employee incentive programs violates the Illinois Administrative Procedures Act ("APA"). 5 ILCS 100/1-1 et seq. The Department had recently proposed to amend regulation § 130.401 titled, "Meaning of Gross Receipts." 86 Ill. Admin. Code § 130.401. It is proposed that the amended definition include, *inter alia*, the following sentence: "If the seller receives a

reimbursement or rebate from any source, the amount of that reimbursement or rebate is considered part of the gross receipts received by the seller and is fully taxable."

"Apex" argues that the APA sets forth the procedure that a state agency must follow in adopting a "rule." This procedure includes proper notice of the rule, the opportunity to comment, and a public hearing. Under the APA, the term "rule" means "any agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." 5 ILCS 100/1070. "Apex" contends that the proposed amendment to regulation § 130.401 proves that the opinions set forth in the Letter Rulings on employee incentive programs were intended to be statements of general applicability that implement, apply, interpret or prescribe law or policy, and which cannot now be applied retroactively against "Apex".

The Department's policy of taxing manufacturer's payments, such as "Champion's" payment to "Apex", is set forth in the existing 86 Ill. Admin. Code § 130.401, which states that "gross receipts means all the consideration actually received by the seller, except traded-in tangible personal property" (emphasis added). This definition obviously addresses and includes all consideration, including manufacturers' payments. The definition is cited in Letter Rulings 94-0422 and 98-0020. This regulation also reflects pertinent statutory definitions as well as court interpretations of them, as discussed *supra*.

There is no recognizable merit to "Apex's" contention that the Letter Rulings are being applied retroactively. The interpretation of the existing regulation § 130.401 as contained in this "Final Administrative Decision" corresponds to and is in agreement with the interpretation contained in the Letter Rulings. "Champion's" payments to "Apex" are taxable, not because of the Letter Rulings, but because the Retailers' Occupation Act, legislatively enacted, and the case law interpreting that Act dictate that the payments are taxable. The ALJ recommended that the

proposed amendment to regulation § 130.401, which has not yet been adopted, not be applied to "Apex". I agree with this part of the recommendation and the proposed amendment to regulation § 130.401 has not been considered in writing this "Final Administrative Decision."

**WHEREFORE, IT IS HEREBY ORDERED THAT**:

1. The Department's Cross Motion for Summary Judgment is granted.
2. "Apex's" Motion for Summary Judgment is denied.
3. The NTL previously issued to "Apex" is upheld.
4. A final assessment shall issue in accord with this determination.

September 11, 2001

_____
Glen L. Bower, Director
Illinois Department of Revenue

**STATE OF ILLINOIS**
**DEPARTMENT OF REVENUE**
**OFFICE OF ADMINISTRATIVE HEARINGS**
**CHICAGO, ILLINOIS**

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| **THE DEPARTMENT OF REVENUE** | ) | Docket No. 00-ST-0000 |
| **OF THE STATE OF ILLINOIS** | ) | Reg. No. 0000-0000 |
| v. | ) | NTL No. SF-0000000000000 |
| **"APEX MOTOR SALES, INC.",** | ) | John E. White, |
| **Taxpayer** | **)** | **Administrative Law Judge** |

**RECOMMENDED ORDER REGARDING THE**
**PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT**

This matter arose after "Apex Motor Sales, Inc." (“Apex” or “taxpayer”) protested a Notice of Tax Liability (“NTL”) the Illinois Department of Revenue (“Department”) issued to "Apex" regarding following an audit of its business for the months of January 1, 1996 through and including September 30, 1998. The NOD corrected returns "Apex" filed during those months regarding its sales of cars in Illinois.

Each party filed a motion for summary judgment. The parties’ cross-motions take contrary positions as to whether certain payments or credits "Apex" received from "Champion Motors Corporation" pursuant to an Employee/Retiree New Vehicle Purchase/Lease Program are part of the gross receipts that are subject to retailers’ occupation tax, pursuant to the Retailers’ Occupation Tax Act (“ROTA”). 35 **ILCS** 120/1 *et seq.* I have reviewed the parties’ motions, the exhibits and affidavits attached thereto, and the memoranda filed regarding the motions. I am including as part of this recommendation a summary of the material facts not in dispute. I recommend partial summary judgment be entered for "Apex", and partial summary judgment be denied for the Department.

**Facts Not In Dispute**

1. "Apex" is a Delaware Corporation with its principal place of business in (Someplace), Illinois. Taxpayer’s Motion for Summary Judgment (“TMSJ”), ¶¶ 3-4 & Exhibit 1 thereto ¶ 4 (exhibit 1 is an affidavit of "John Doe" (hereinafter, “Doe" Aff. ¶ [ ]”)); Department’s Cross-Motion for Summary Judgment and Memorandum and Response to Taxpayer’s Motion for Summary Judgment (“DMSJ”) ¶ 15 (paragraph 15 of the Department’s motion provides, “There is no dispute over material facts. The Department agrees to and incorporates all material facts as set forth by the Taxpayer … into the Department’s Motion ….”).

2. "Apex" is engaged in business as an automobile dealer, and "Champion Motors Corp." (hereinafter, “Champion”) is a manufacturer and wholesaler of vehicles. *See* "Doe" Aff. ¶¶

5-12; DMSJ ¶ 15. During the period at issue, "Apex" was a party to a valid sales and service agreement with "Champion". TMSJ ¶ 5; "Doe" Aff. ¶¶ 5-6; DMSJ ¶ 15.

3. "Champion" established an Employee/Retiree New Vehicle Purchase/Lease Program (“Program”) to allow active and retired employees of "Champion", and their family members, to purchase or lease "Champion" vehicles at a reduced price. TMSJ ¶ 6 & Exhibit 2 thereto ¶¶ 2, 4-5 (exhibit 2 is the affidavit of "Richard Roe" (hereinafter “Roe" Aff. ¶ [ ]”), a Director of "Champion’s" Fleet Operations division, which administers the Program); "Doe" Aff. ¶ 7; DMSJ ¶ 15.

4. Any automobile dealer who is a party to a valid sales and service agreement with "Champion" is eligible to participate in the Program. TMSJ ¶ 7; "Roe" Aff. ¶ 4; DMSJ ¶ 15.

5. "Apex" is a participating dealer in the Program. TMSJ ¶ 7. "Doe" Aff. ¶ 6; DMSJ ¶ 15.

6. A "Champion" dealer that participates in the Program must sell or lease a vehicle at the “Employee Purchase Price” listed on the factory invoice. TMSJ ¶ 8; "Doe" Aff. ¶ 8; "Roe" Aff. ¶ 6; DMSJ ¶ 15.

7. The factory invoice is "Champion’s" invoice to a dealer. The factory invoice is not available to a regular customer. "Doe" Aff. ¶ 9; "Roe" Aff. ¶ 7; DMSJ ¶ 15.

8. The factory invoice always contains a price line item designated with the letters “EP”, which item states the price that must be used by the dealer for a sale to an eligible customer pursuant to the Program. "Doe" Aff. ¶ 10; "Roe" Aff. ¶ 8; DMSJ ¶ 15.

9. An eligible purchaser/lessee cannot negotiate the “Employee Purchase Price” with a dealer. "Doe" Aff. ¶ 11; "Roe" Aff. ¶ 9; DMSJ ¶ 15.

10. A participating dealer may not charge an eligible purchaser/lessee for any preparation fee, documentation fee, delivery and handling charges, service or overhead fees, or any other such delivery fees. "Doe" Aff. ¶ 12; "Roe" Aff. ¶ 10; DMSJ ¶ 15.

11. After a participating dealer makes a sale under the Program, it receives from "Champion" a payment equal to six percent (6%) of the Employee Purchase Price amount, plus $75. "Roe" Aff. ¶ 12; DMSJ ¶ 15. "Apex" received such Program payments for each eligible Program sale it made during the audit period. TMSJ ¶ 11; "Doe" Aff. ¶ 14; DMSJ ¶ 15.

12. "Champion's" Program payments are processed by electronic funds transfer or as a reduction in the amount the dealer owes "Champion" as listed on the monthly dealer parts account. "Roe" Aff. ¶ 17; DMSJ ¶ 15.

13. "Champion's" payments or credits to dealers, as part of the Program, is a means by which "Champion" reduces the price that it charges a dealer for a vehicle sold under the Program. TMSJ ¶ 12; "Roe" Aff. ¶ 14; DMSJ ¶ 15.

14. Consistent with the purpose for which they are given, "Apex" treats the Program payment from "Champion" as a reduction in its cost of goods sold on its general ledger. TMSJ ¶ 15; "Doe" Aff. ¶ 20; DMSJ ¶ 15.

15. At the time that a dealer purchases a vehicle from "Champion", neither the dealer nor "Champion" is able to determine if the vehicle will be sold under the Program. TMSJ ¶¶ 9-10; "Doe" Aff. ¶ 15; "Roe" Aff. ¶ 13; DMSJ ¶ 15.

16. When an eligible purchaser/lessee visits "Apex" and identifies himself or herself as a "Champion" employee or family member, he receives a brochure explaining the Program. "Doe" Aff. ¶ 17; "Roe" Aff. ¶ 21; DMSJ ¶ 15. The brochure, however, does not explain to

the reader about "Champion's" Program payments or credits to the dealer. "Doe" Aff. ¶ 17; "Roe" Aff. ¶ 18-22; DMSJ ¶ 15.

17. "Champion" does not inform its employees or their families members about the payment made to a dealer with respect to an eligible sale under the Program. "Roe" Aff. ¶ 18; DMSJ ¶ 15.

18. Most "Champion" employee/customers and their family members do not have access to the written rules that govern a dealer's rights and obligations under the Program (commonly referred to as the Gold Book). "Roe" Aff. ¶ 22; DMSJ ¶ 15.

19. Generally speaking, only those "Champion" employees who administer the Program, or provide counsel regarding the Program, have knowledge of the payments or credits to dealers under the Program. "Roe" Aff. ¶ 20; DMSJ ¶ 15.

20. "Apex" did not include the "Champion" Program payments or credits within the amount of gross receipts it reported on the Illinois Sales and Use Tax Returns it filed for the months of January 1996 through September 1998. "Doe" Aff. ¶ 21; DMSJ ¶ 15.

21. "Champion" employee/retirees and their family members who purchase vehicle pursuant to the Program, in addition to the reduced purchase price provided by the Program, still receive any and all consumer rebates that may be available to the general public at the time of the vehicle purchase. Examples of such rebates include, but are not limited to, special financing arrangements or cash rebates. "Roe" Aff. ¶ 23; DMSJ ¶ 15.

22. "Apex" remits ROT on consumer rebates that are part of the contract between "Apex" and a purchaser. TMSJ ¶ 16; "Doe" Aff. ¶ 19; DMSJ ¶ 15.

23. Following an audit, the Department determined that "Apex" should have treated the amounts of "Champion's" Program payments or credits as taxable gross receipts on the

returns it filed during the audit period. TMSJ ¶ 14; DMSJ, Ex. 1 thereto (exhibit 1 is the Department's correction of "Apex's" returns, under the certificate of the Director).

**Conclusions of Law:**

The issue is whether, as a matter of law, the Program payments or credits are part of the "gross receipts," the "selling price" or the "amount of sale," from "Apex's" "sales at retail," as those related terms are defined in § 1 of the ROTA, and upon which tax is to be measured pursuant to § 2-10 of the ROTA. 35 **ILCS** 120/1, 2-10; Memorandum in Support of Taxpayer's Motion for Summary Judgment ("'Apex's" Brief"), p. 5; Memorandum in Support of the Department's Motion for Summary Judgment and Response to Taxpayer's Motion for Summary Judgment, ("Department's Brief"), p. 1.

When making these conclusions of law, I am mindful that the Department attached as an exhibit to its motion the correction of "Apex's" returns, under the certificate of the Director. DMSJ, Ex. 1. Pursuant to § 4 of the ROTA, that correction of "Apex's" returns constitutes prima facie proof of the correctness of the amount of tax due. 35 **ILCS** 120/4. The Department's prima facie case is a rebuttable presumption. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157, 242 N.E.2d 205, 207 (1968); DuPage Liquor Store, Inc. v. McKibbin, 383 Ill. 276, 279, 48 N.E.2d 926, 927 (1943). A taxpayer cannot overcome the presumption merely by denying the accuracy of the Department's assessment. A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 833, 527 N.E.2d 1048, 1053 (1st Dist. 1988). Instead, a taxpayer has the burden to present evidence that is consistent, probable and closely identified with its books and records, to show that the assessment is not correct. Fillichio v. Department of Revenue, 15 Ill. 2d 327, 333, 155 N.E.2d 3, 7 (1958); A.R. Barnes & Co., 173 Ill. App. 3d at 833-34, 527 N.E.2d at 1053.

In this case, the parties have agreed that there is no dispute regarding the facts material to the issue presented. *See* TMSJ, *passim*; DMSJ ¶ 15. A motion for summary judgment is appropriate where the pleadings, affidavits, and other documents on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 **ILCS** 5/2-1005; People *ex rel*. Department of Revenue v. National Liquors Empire, Inc., 157 Ill. App. 3d 434 (4th Dist. 1987). I agree with the parties and recommend that the matter should be resolved via the parties' cross-motions.

It is also important to recall that this matter does not involve an exemption from taxation, but instead involves whether certain amounts are to be included within the base upon which tax is measured. 35 **ILCS** 120/1, 2-10. Thus, when making these conclusions of law, I will heed the Illinois supreme court's direction that "[t]axing statutes are to be strictly construed and their language is not to be extended or enlarged by implication beyond its clear import, but in cases of doubt such laws are construed most strongly against the government and in favor of the taxpayer. Chet's Vending Service, Inc. v. Department of Revenue, 71 Ill. 2d 38, 42, 374 N.E.2d 468, 470 (1978).

**"Apex's" Motion**

In its motion, "Apex" asserts that the ROTA's definitions of "selling price" and "gross receipts" should be understood to include only the consideration that passes from the purchaser to the seller, pursuant to the agreement for the tangible personal property being sold at retail for use or consumption. "Apex's" Brief, pp. 7-10. "Apex" contends that the undisputed facts of this matter clearly show that the payments or credits at issue were part of the consideration exchanged pursuant to the contract for the transfer of tangible personal property between it and "Champion" (i.e., the sale for resale) and were not part of the consideration exchanged pursuant to the contract

for the transfer of tangible personal property between it and its customers (i.e., the sale at retail). "Apex" points out that, since eligible purchasers at retail do not even know that "Champion" has agreed to reduce "Apex's" wholesale cost of a car sold under the Program, such a reduction could not possibly constitute part of the "consideration" that an eligible purchaser paid to "Apex" for a car sold under the Program.

"Apex" contends that, as a matter of law, the Department cannot treat "Champion's" reduction of the price that "Apex" had to pay for vehicles purchased for resale — which reduction is part of the consideration between "Champion" and "Apex" for the latter's participation in the Program — as part of the consideration that an eligible purchaser paid to "Apex" when purchasing a vehicle from it under the Program. *Id*. p. 14. "Apex" argues that the Illinois supreme court case of Keystone Chevrolet v. Kirk 69 Ill. 2d 483, 372 N.E.2d 651 (1978), and a 1990 Department private letter ruling both support its argument that the statutory definitions of selling price and gross receipts should be interpreted to embrace the value of the consideration that is part of the contract for the sale at retail, but not the value of the consideration that is part of the contract for the sale for resale. *Id*., pp. 1, 8-10.

**Department's Motion**

The Department's motion asserts that tax must be assessed on "Champion's" reduction in "Apex's" wholesale cost of vehicles sold under the program since "… it is clear that the Illinois General Assembly intended to include all compensation received by a seller from a sale, including payments from third parties, in a seller's gross receipts." Department's Brief, p. 6. It argues that it does not matter whether an eligible purchaser knows about payments made by third parties, since gross receipts are not limited to compensation paid or known of by the purchaser. *Id*. pp. 7-8. What the Illinois General Assembly intends to be taxed as gross receipts, the Department asserts, is any

monies or credits that a seller actually receives in connection with a particular sale at retail — regardless whether such additional payments or credits come from a source other than the purchaser.

The Department cites letter rulings other than the one cited by "Apex",[2] and also claims that Keystone actually supports its position and not "Apex's". The Department concludes by arguing:

> … Taxpayer receives a fixed sum from the consumer for the car, and additional compensation from the Manufacturer for selling the vehicle at a discount. Accordingly, payments must be included in the Taxpayer's gross receipts and are therefore subject to ROT.

Department's Brief, p. 14.

**Analysis**

Since this issue involves the proper construction of terms defined within § 1 of the ROTA, and the base upon which tax is measured pursuant to § 2-10 of the ROTA, I will begin by quoting the pertinent parts of those sections. Section 2-10 of the ROTA provides, in part:

> Rate of tax. Unless otherwise provided in this Section, the tax imposed by this Act is at the rate of 6.25% of gross receipts from sales of tangible personal property made in the course of business. ***

35 **ILCS** 120/2-10.

Section 1's definition of "gross receipts" refers one to the definition of the terms "selling price" or "amount of sale," and provides:

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[2] After being advised that the Department's motion was based, in part, on opinions set forth in private letter rulings issued to others, "Apex" argued that the Department's attempt to bind it to such opinions constitutes a violation of § 5-10(c) of the Illinois Administrative Procedures Act. Taxpayer's Response, pp. 10-13. This recommendation does not address the particular opinions set forth in the different private letter rulings cited by the parties, since the text of §§ 1 and 2-10 of the ROTA, as well as Illinois supreme court cases interpreting that text, are sufficient to show that the amounts at issue in this matter do not come within the legislature's definitions of "gross receipts," "selling price" or "amount of sale."

> "Gross receipts" from the sales of tangible personal property at retail means the total selling price or the amount of such sales, as hereinbefore defined. ***

35 **ILCS** 120/1. Finally, § 1 equates the terms "selling price" and "amount of sale," and it defines those terms together as:

> "Selling price" or the "amount of sale" means the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property, other than as hereinafter provided, and services, but not including the value of or credit given for traded-in tangible personal property where the item that is traded-in is of like kind and character as that which is being sold, and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever, ….
>
> ***

35 **ILCS** 120/1.

**Whose Consideration Do the Program Payments Represent?**

"Apex" attached to and made part of its motion two affidavits. The first is the affidavit of Janet "Doe", "Apex's" Secretary. "Doe" Aff. ¶ 2. The second is the affidavit of Donald "Roe", a director of "Champion's" Fleet Operations division, which division is responsible for administering the Program for "Champion". "Roe" Aff. ¶ 2. "Roe" averred that the 6% of employee purchase price plus $75 payment that "Champion" wired to "Apex" (or credited to "Apex's" monthly parts account) following each eligible Program sale was made to reduce the price "Champion" charged "Apex" for the vehicles sold under the Program. "Roe" Aff. ¶ 14. "Roe" also averred that the payments are processed by electronic funds transfer or as a reduction in the amount the dealer owes "Champion" as listed on the monthly dealer parts account. "Roe" Aff. ¶ 17. "Doe" averred that "Apex" treats those payments as a reduction of the cost of goods sold. "Doe" Aff. ¶ 20. In a nutshell, "Apex's" motion includes statements of fact by an employee/agent of each party to the

sales and service agreement as to the parties' intent and treatment of monies or credits passed from "Champion" to "Apex" pursuant to the Program. "Roe" Aff. ¶ 14; "Doe" Aff. ¶ 20.

There is no dispute regarding those material facts, since the Department expressly adopted and incorporated them as part of its motion. DMSJ ¶ 15; Department's Brief, p. 3. And even if the Department did not expressly adopt the well-pleaded facts set forth in the affidavits incorporated as part of "Apex's" motion, those facts are admitted by operation of law, since they were not contradicted by any counter-affidavits offered by the Department. Purtill v. Hess, 111 Ill.2d 229, 489 N.E.2d 867 (1986). Nor can there be any question that the averments just mentioned constitute well-pleaded facts by persons who are authorized to speak, and with personal knowledge, of such facts. "Roe" Aff. ¶¶ 1-3, 14; "Doe" Aff. ¶¶ 1-3, 20.

Both "Roe" and "Doe" additionally aver that, when "Champion" makes a wholesale sale of vehicles to "Apex", neither it nor "Apex" knows which particular vehicles will be sold pursuant to the Program. "Roe" Aff. ¶ 13; "Doe" Aff. ¶ 15. What is reasonably inferred from such undisputed facts (*see* DMSJ ¶ 15) is that "Apex" pays for the vehicles it purchases at wholesale from "Champion" before it sells them at retail. Loyola Academy v. S & S Roof Maintenance, Inc., 146 Ill. 2d 263, 586 N.E.2d 1211 (1992) (when deciding motions for summary judgment, reasonable inferences may be drawn from undisputed facts). Since "Apex" has already paid "Champion" for vehicles in its sales inventory, the only way for "Champion" to reduce "Apex's" cost of a vehicle sold under the Program would be to either give "Apex" a credit against future purchases of vehicles other items, or to tender a payment to "Apex" that is tied to the "EP" price at which the previously paid for vehicles were sold. That, the undisputed facts show, is precisely what the parties agreed to do, and in fact did, here. "Roe" Aff. ¶ 17; DMSJ ¶ 15.

While it expressly adopts the facts set forth in "Apex's" motion as part of its own motion, the Department also makes the following statements with regard to those facts:

> The Department notes one exception to Taxpayer's facts, which is the characterization of the payments as reductions in the price that the manufacturer charges Taxpayer for a vehicle sold under the Program. The Department does not dispute the fact that the Taxpayer, for accounting purposes, treats the Manufacturer payments as a debit and a credit to costs of goods sold. However, how Taxpayer utilizes this fact in its Memorandum and Motion is irrelevant for ROT purposes and somewhat misleading. Taxpayer's method of accounting, i.e., treating the payments as credit instead of a receivables, does not effect the monies actually received by the Taxpayer from a sales pursuant to the Program, nor its profit realized.
>
> ***
>
> … What is relevant for ROT purposes is the total amount of compensation received for a particular sale. How the Taxpayer accounts for the receivables is not relevant for calculating gross receipts, and ultimately ROT.

Department's Brief, p. 3-5.

"Apex's" treatment of the Program payments or credits as a reduction in the cost of its goods sold, however, is not "irrelevant" or "immaterial" as argued by the Department. Department's Brief, pp. 4 (describing as irrelevant "Apex's" use of the fact that "Champion's" Program payments or credits were made to reduce "Apex's" cost of vehicles purchased for resale), 5 (italicizing the word "material"); Department's Reply to Taxpayer's Response to the Department's Cross-Motion for Summary Judgment and Response in Support of its Cross-Motion for Summary Judgment ("Department's Response"), p. 12 ("The Manufacturer's reason for making the payment, and how the Taxpayer accounts for the Manufacturer's payment, is irrelevant for purposes of the ROT."). Rather, "Apex's" treatment of such amounts as a reduction in its cost of goods purchased for resale is both admitted (DMSJ ¶ 15; Purtill v. Hess, 111 Ill.2d 229, 489 N.E.2d 867 (1986)), and premised upon undisputed facts. "Apex" treats the Program payments or credits as a reduction in its wholesale costs of goods sold, not because of some accounting trickery, but because "Champion"

and "Apex" have agreed that such payments or credits are, "… a means by which ["Champion"] reduces the price that it charges a dealer for a vehicle sold under the Program." "Roe" Aff. ¶ 14; "Doe" Aff. ¶ 20.

So, contrary to the Department's charge that "Apex's" motion is misleading in its use of the undisputed facts of this matter (*see* Department's Brief, p. 4), it is the Department which expressly adopts and incorporates the facts of "Apex's" motion as part of its own motion, and then makes arguments that are inconsistent with those well-pleaded facts. For example, the Department argues that "Champion's" reduction of "Apex's" wholesale cost of goods later sold under the Program is a receivable of "Apex's" that is part of the compensation that "Apex" realizes from its sales of vehicles at retail. Department's Brief, pp. 4-5. But § 1's definitions of related terms use the word "consideration," not "compensation," and the two terms are not synonymous, as the Department's arguments suggest. *See id.*; Department's Response, p. 2 & n.1; *compare also* Black's Law Dictionary 256 (5th ed. 1979) (definition of "compensation") *with id*. 277-78 (definition of "consideration"). Second, the "Champion's" Program payments or credits are not an "Apex" "receivable," as that word is commonly defined.

Black's Law Dictionary defines a "receivable" as, "[a]ny collectible whether or not it is currently due. That which is due and owing a person or company (e.g., account receivable). In bookkeeping, the name of an account which reflects a debt due." Black's Law Dictionary 1140 (5th ed. 1979). The word "debt" in turn, in defined as "[a] sum of money due by certain and express agreement. A specified sum of money owing to one person from another, including not only obligation of debtor to pay but right of creditor to receive and enforce payment. ***." *Id.*, at 363. The undisputed facts here are that the "Champion" payments or credits to "Apex" were made to reduce "Apex's" previously satisfied debt to "Champion" for the vehicles "Apex" purchased for

resale and subsequently sold pursuant to the Program. TMSJ ¶¶ 12, 15; "Doe" Aff. ¶ 20; "Roe" Aff. ¶¶ 14, 17; DMSJ ¶ 15. Thus, the debt to which the payments or credits relate is *"Apex's"* debt to "Champion" for "Apex's" purchase of the vehicles subsequently sold pursuant to the Program.

Now, I acknowledge that one might, at first blush, view the Program payments as being related to "Champion's" promise to pay money to "Apex" for each of "Apex's" sales under the Program. But that facile view gives short shrift to the facts regarding — and the way Illinois law treats — the commercial relationship between "Champion" and "Apex". There is no dispute here that "Champion" is a manufacturer and wholesaler of tangible personal property, and "Apex" is a dealer or retailer of the property "Champion" manufactures. "Doe" Aff. ¶¶ 5-6, 15, 19; DMSJ ¶ 15; *see also* Department's Brief, p. 3 ("Facts" section). Illinois commercial law has long been clear that, "[t]he obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." 810 **ILCS** 5/2-301. As a wholesaler, "Champion's" consideration consists generally of its promise to sell (i.e., to transfer and deliver) vehicles to "Apex" for subsequent sale at retail, and "Apex's" consideration consists generally of its promise to accept and pay for them. *Id.*; "Roe" Aff. ¶¶ 7-8, 14; "Doe" Aff. ¶¶ 5-6. Of the two, it is only "Apex", the buyer, whose fundamental obligation is to pay money to the other. 810 **ILCS** 5/2-301; *see also* Softa Group, Inc. v. Scarsdale Development, 260 Ill. App. 3d 450, 453 (1st Dist. 1993) (summary judgment entered for seller for contract price of goods accepted by buyer because, under § 2-607(1) of Illinois' Commercial Code, "a buyer is required to pay the contract price for any goods accepted."). The Program payments or credits are not receivables to "Apex"; rather, they are a portion of "Champion's" receivables from its sales for resale to "Apex", which portion "Champion" has agreed to refund or credit to "Apex" for each Program sale. "Roe" Aff. ¶ 14; 810 **ILCS** 5/2-301. Put another way, the Program payments or credits represent the amount by which

"Champion" discounted or reduced "Apex's" purchase price for the goods that "Apex" purchased for resale, and sold at retail to an eligible Program purchaser. "Roe" Aff. ¶ 14; DMSJ ¶ 15.

And therein lies the fundamental conflict between the parties' motions. Notwithstanding the Department's express "incorporat[ion] of all material facts as set forth by the Taxpayer in its Motion for Summary Judgment … into the Department's Motion ...", the Department simply refuses to treat the Program payments as what they are — a discount or reduction of the amount of the consideration that "Apex", the retailer/purchaser, owes or has paid to "Champion", the manufacturer/seller, regarding its purchase of goods for resale. I will not, however, treat the parties' contrasting viewpoints as a dispute over a material fact. "Apex" has presented sworn affidavits of competent persons with personal knowledge of the facts surrounding the Program, and those persons have included well-pleaded facts within their affidavits. TMSJ, Exs. 1-2. Those affidavits articulate precisely what "Champion's" Program payments are, and the Department expressly adopted those facts and incorporated them into its motion. DMSJ ¶ 15; Department's Brief, p. 3. The parties do not dispute the facts; they dispute the legal effect of them.

**May — or Must — the Amount By Which "Champion" Discounted "Apex's" Wholesale Cost of Vehicles Purchased For Resale Be Transferred to Become Part of the Consideration From "Apex's" Sales At Retail?**

In criminal law, there is a concept called transferred intent. What that concept means is that if a person, A, points and shoots a loaded weapon at B intending to kill him, but instead mistakenly strikes C and kills him, A might still be convicted of C's murder. *E.g.*, People v. Thompson, 313 Ill. App. 3d 510, 516, 730 N.E.2d 118, 123 (1st Dist. 2000). A's intent to shoot and kill B is transferred to C. *Id.* Here, the Department similarly argues that it must, as a matter of law, transfer the consideration exchanged between the parties to the wholesaler-to-retailer transaction, so as to make

it part of the consideration that is exchanged between the parties to the retailer-to-consumer transaction.

Specifically, the Department argues that "Champion's" reduction of the amount of consideration that "Apex" owes "Champion" pursuant to the "Champion"-to-"Apex" wholesale agreement must be added to the consideration passed from the purchaser to "Apex" as part of the "Apex"-to-Program purchaser sale at retail. Department's Response, p. 3. The Department's transferred consideration argument is crystallized in the following paragraph in its brief:

> Here, a qualified employee pays the Taxpayer consideration for a car sold to him at a discount price under the Program. In addition, the Manufacturer pays the Taxpayer consideration for the same sale. Therefore, the Taxpayer receives two considerations — consideration from the employee and consideration from the Manufacturer, and the total considerations make up Taxpayer's taxable gross receipts on that particular sale.

Department's Response, p. 3. The Department cites Chet's Vending Service, Inc. to support its argument that the amount by which "Champion" reduced "Apex's" wholesale cost of vehicles should be considered part of "Apex's" gross receipts, because "Champion" has expressly conditioned its discount on whether a purchaser for use or consumption is a "Champion" employee or a family member. Department's Response, pp. 5-6.

Chet's Vending Services, Inc. was a caterer, and the case the Department cites involved certain agreements Chet's entered into with different employers. Chet's, 71 Ill. 2d at 39, 374 N.E.2d at 469. In the first type of agreement, Chet's agreed to come to employers' locations and make sales of food to the employers' employees, and the employers agreed to pay Chet's a fixed monthly fee for doing so. Chet's then went to the employers' locations and made retail sales of food to the employers' employees. In the second circumstance, Chet's again entered into agreements with employers to come to the employers' locations and make sales of food to their

employees. However, these agreements required Chet's to tender a statement to each employer on which it reported the amounts it received from selling food to the employee purchasers, as well as a statement of its costs for purchasing the food sold. Each employer then agreed to "make up the difference" by making a payment to Chet's. Chet's, 71 Ill. 2d at 39, 374 N.E.2d at 469. In both types of contracts, Chet's measured ROT by the amounts it received from employees, and it did not pay tax on the fees or amounts it received from the employers. *Id*. Notwithstanding the fact that the Illinois supreme court held that the fees were not subject to ROT (*id*. at 43, 374 N.E.2d at 470), the Department asserts that Chet's impliedly supports a conclusion that "Apex's" reduced wholesale cost of vehicles purchased for resale should be subject to ROT. Department's Response, p. 5.[3]

Chet's was decided the way it was, it seems to this writer, because the court took pains to focus on two separate questions: (1) who were the actual parties to the sale at retail, and (2) what was the amount of consideration that the purchasers actually paid to the retailer to acquire property for use or consumption. It took this approach, moreover, after consulting § 1's interrelated definitions of "gross receipts," "selling price" or "amount of sales," and "purchaser." Chet's, 71 Ill. 2d at 41, 374 N.E.2d at 469. Specifically, the court wrote:

> The sales of food and beverages involved here effected a transfer of ownership or title to the employee-purchaser "for use or consumption," and the employee who bought the item was the "purchaser." Each sale was a separate transaction, and as defined in the statute (ch. 120, par. 440) the "selling price" was "the consideration * * * valued in money whether received in money or otherwise, including cash, credits, property other than tangible personal property and services * * *." The evidence shows no basis for relating any portion of the fixed fee or guarantee payment to any individual sale as part of the "selling price." To construe the terms "selling price" and "gross receipts" in the manner for which defendant [the Department] contends would require us to hold that the manual or cafeteria-type sales at each industrial location during a

[3] When citing Chet's to support its motion, the Department emphasizes the dissent more than it does the majority's decision. Department's Response, pp. 7-8, 10 (quoting portions of Justice Underwood's dissenting opinion). This recommendation relies on the majority's analysis.

> calendar month were one sale to both the employer and the employees, the "selling price" of which was the aggregate of the sums received from the employees and the monthly payment received from the employer. "Taxing statutes are to be strictly construed and their language is not to be extended or enlarged by implication beyond its clear import, but in cases of doubt such laws are construed most strongly against the government and in favor of the taxpayer." (Ingersoll Milling Machine Co. v. Department of Revenue, 405 Ill. 367, 373, 90 N.E.2d 747, 751.) We have considered the arguments of the parties concerning the nature of the payments and conclude that whether the payments were made for the purpose of enabling plaintiff to reduce the cost of the food and beverages which it sells to the employees or to guarantee it a profit from its operation is wholly irrelevant. Under the clearly defined terms employed in the statute, the payments were not includable in plaintiff's "gross receipts."

Chet's, 71 Ill. 2d at 42-43, 374 N.E.2d at 470. The court in Chet's refused to accept the Department's argument that a third party's payments to the retailer, pursuant to the agreement between them, should be considered part of the "selling price" or "amount of sale" that the retailer actually received from the "purchasers" who were the other parties to the "sales at retail." *Id*.

In that respect, Chet's does not support the Department's transferred consideration approach because it wholly ignores the substantive difference between the agreements for "Apex's" purchases for resale and the agreements for its sales at retail. In a bilateral agreement, such as the sales and service agreement between "Champion" and "Apex", or such as the agreement for the sale at retail between "Apex" and a purchaser, both sides to each agreement ordinarily exchange a set of promises, and each parties' set of promises constitutes his consideration for the agreement. *E.g.*, Nathan v. Leopold, 108 Ill. App. 2d 160, 169, 247 N.E.2d 4, 9 (1st Dist. 1969). For a bilateral contract to be enforceable, there must be adequate consideration exchanged by each party. Steinberg v. Chicago Medical School, 69 Ill. 2d 320, 371 N.E.2d 634 (1969).

Here, "Champion's" consideration under the sales and service agreement might generally be understood as its promise to tender conforming vehicles to "Apex", as well as accompanying

services. "Doe" Aff. ¶ 5; "Roe" Aff. ¶ 4; DMSJ ¶ 15; *see also* 810 **ILCS** 5/2-301. With regard to the Program, "Champion" has further promised to reduce "Apex's" cost price of each vehicle "Apex" sells to an eligible purchaser at retail. "Doe" Aff. ¶¶ 14, 20; "Roe" Aff. ¶ 14; DMSJ ¶ 15. But that consideration is part of *"Champion's"* promises with regard to the sales and services agreement with "Apex". "Champion" is not a party to the sale at retail (*see* "Doe" Aff. ¶¶ 7-8, 11), and "Champion's" performance of its promise to reduce "Apex's" cost price of each vehicle "Apex" sells under the Program is not part of the consideration that is exchanged between the parties to the sale at retail. "Doe" Aff. ¶¶ 17-18. Indeed, it is an undisputed fact that eligible purchasers do not even know about "Champion's" promise to reduce "Apex's" cost of a vehicle sold under the Program. "Roe" Aff. ¶¶ 18-22; DMSJ ¶ 15. How can "Champion's" performance of its promise be part of the consideration a purchaser pays to "Apex" if the purchaser does not even know about that promise?

I therefore agree with "Apex's" argument that the word “consideration”, as used in § 1 of the ROTA, is intended to refer to the consideration that is part of the agreement between the retailer and the purchaser for use and consumption. I base that conclusion on the Illinois General Assembly’s consistent use of the word “consideration” within the definitions of different yet related terms set forth in § 1 of the ROTA, and on a plain reading of such terms as used in other sections of the Act. Kraft, Inc. v. Edgar, 138 Ill. 2d 178, 189, 561 N.E.2d 656, 661 (1990) (“… in ascertaining the meaning of a statute, the statute should be read as a whole with all relevant parts considered.”). I also base it on the Illinois supreme court’s consistent rulings in Chet’s and Keystone.

Under § 1 of the ROTA, “[a] ‘sale at retail’ means any transfer of the ownership of or title to tangible personal property to a purchaser, for the purpose of use or consumption, and not for the purpose of resale in any form as tangible personal property to the extent not first subjected to a use

for which it was purchased, *for a valuable consideration* …." 35 **ILCS** 120/1 (emphasis added). The word "consideration" is next used in the definition of a "purchaser," which the legislature said, "means anyone who, through a sale at retail, acquires the ownership of or title to tangible personal property *for a valuable consideration*." *Id.* (emphasis added). Finally, when defining "selling price," or the "amount of sale," the legislature once again used the word "consideration," which, it said, was to be "valued in money whether received in money or otherwise, including cash, credits property other than as hereinafter provided, and services …." *Id*.; *see also supra*, page 10 (quoting § 1's definition of "selling price" or "amount of sale").

It is entirely reasonable, if not inescapable, to understand the "valuable consideration" the legislature referred to in its definition of a "sale at retail," as being the same "valuable consideration" that a purchaser tenders to a retailer to acquire the tangible personal property that is the subject of the sale at retail. *See* Chet's, 71 Ill. 2d at 42, 374 N.E.2d at 470. It follows further that the legislature intended the "… consideration … valued in money …" that constitutes a retailer's "selling price" or the "amount of sale," to be the very same "valuable consideration" that the "purchaser" pays to acquire the goods that are the subject of the "sale at retail." 35 **ILCS** 120/1. Reading the word "consideration" to mean different things in each of the terms defined in § 1 runs roughshod over the legislature's careful attempt to define and relate the component parts of a "sale at retail." Chet's, moreover, reflects the Illinois supreme court's conclusion that the legislature intended to limit the measure of tax to the amount of the gross receipts a retailer actually receives from the purchasers of property at retail. Chet's, 71 Ill. 2d at 42-43, 374 N.E.2d at 470.

In its response, however, the Department argues that "[n]owhere does it state in Section 1 that 'consideration' is limited to the transaction or bargain between the seller and the purchaser." Department's Response, p. 8. Yet it defies logic to read all of the definitions of interrelated terms

set forth in § 1 of the ROTA, which terms are thereafter used throughout the Act, and understand the word "consideration" to pertain to anything but the "valuable consideration" the purchaser pays to acquire the tangible personal property that is the subject of the "sale at retail." 35 **ILCS** 120/1. The legislature, like most writers, does not always needlessly repeat objective or prepositional phrases where the accompanying text makes it absolutely clear what is being described.

So, for example, in Saxon Western Corp. v. Mahin, when the Illinois supreme court wrote that a retailer "… need only ... pay a tax on the gross amount it actually receives", it should go without saying that the court was referring to the amount the retailer actually received from the purchaser for the goods sold at retail. Saxon-Western Corp. v. Mahin, 81 Ill. 2d 559, 567, 411 N.E.2d 242, 247 (1980) (holding that the face value of a retailer's discount coupons could not be included as part of the gross receipts upon which ROT is measured). Neither the court in Saxon, nor the legislature in its definition of "selling price" or the "amount of sale," should be blamed for being succinct; any objective reader should be able to understand that the legislature intended tax to be imposed on the value of the consideration that is actually being passed from the purchaser to the retailer pursuant to the sale at retail. 35 **ILCS** 120/1, 2-10; Saxon, 81 Ill. 2d at 567, 411 N.E.2d at 247; Chet's, 71 Ill. 2d at 42, 374 N.E.2d at 470. After taking into account the legislature's consistent use of "consideration" in its definitions of "sale at retail," "purchaser," and "selling price" or "amount of sale" (*see* 35 **ILCS** 120/1), as well as the fact that the legislature imposed tax on the "gross receipts from sales of tangible personal property made in the course of business …" (35 **ILCS** 120/2-10), it is impossible for me to recommend that the Director conclude that the legislature intended ROT to be measured by the amounts by which a wholesaler discounted a retailer's cost price of goods purchased for resale at retail.

Further, when deciding whether consideration, as used in the definition of "selling price" or the "amount of sale" was intended to be limited to the valuable consideration the purchaser pays to acquire goods sold at retail, it is also important to take into account the effect of construing the statute one way or the other. Illinois Power Co. v. Johnson, 116 Ill. App. 3d 618, 626-27, 452 N.E.2d 347, 353 (4th Dist. 1983). It would fundamentally change Illinois' entire scheme of taxation if § 2-10's phrase "gross receipts from sales of tangible personal property made in the course of [a retailer's] business", or § 1's terms "gross receipts," "selling price" or "amount of sale" were construed to include the amount by which a wholesaler reduced a retailer's cost price of goods purchased for resale at retail.

The facts of this matter, for example, present just one of the different bases upon which a wholesaler might decide to discount its price of goods sold for resale. For decades, the Department has had a regulation which provides, *inter alia*, that if a seller gives a purchaser a discount from the selling price, such as a discount for prompt payment, the amount of the discount will not be considered part of the gross receipts from such transactions, so long as the purchaser takes advantage of the discount. 86 Ill. Admin. Code § 130.420(c) (1981); Saxon, 81 Ill. 2d at 566, 411 N.E.2d at 246 (quoting the 1974 version of current regulation § 130.420(c)). It should surprise no one that such discounts are also commonly given in wholesale transactions. *E.g.* Ted Sharpenter, Inc. v. Illinois Liquor Control Com'n., 119 Ill. 2d 169, 518 N.E.2d 128 (1987) (preferential discounts given by beer wholesaler); Milex Products, Inc. v. Alra Laboratories, Inc., 237 Ill. App. 3d 177, 603 N.E.2d 1226 (2nd Dist. 1992) (volume discounts offered by wholesaler); Carling Brewing Co., Inc. v. George F. Doyle Distributing Co., Inc., 41 Ill. App. 3d 116, 353 N.E.2d 222 (2nd Dist. 1976) (prompt payment discount by wholesaler). If the monetary value of discounts that are part of agreements between wholesalers and retailers can be transferred to become part of the

consideration a purchaser gives a retailer to acquire goods during a sale at retail, nothing would stop an enterprising Department auditor from correcting any retailer's monthly returns and assessing tax measured by whatever discounts a retailer may have received from a wholesaler, and then tying a pro-rata amount of such discounts to the "gross receipts" the retailer received from purchasers to acquire the goods sold at retail.

Adopting the Department's transferred consideration approach would arguably allow the Department, under the guise of using its best information and belief, to knowingly ignore the "selling price" a retailer actually charges, or the "amount of sale" that it actually receives from a purchaser when selling goods at retail. Further, that approach transforms a tax nominally imposed on the "gross receipts from selling tangible personal property in the regular course of business" into a thrift tax, that is, a tax that is imposed on the amounts a retailer saves whenever it takes advantage of its vendors' discounts. Such an approach fundamentally changes existing law (*see*, *e.g.*, Goldfarb v. Department of Revenue, 411 Ill. 573, 581, 104 N.E.2d 606, 609 (1952) (the Department may not ignore a retailer's books and records when correcting its tax returns)), and alters the base upon which ROT is measured. 35 **ILCS** 120/1, 2-10.

I also agree with "Apex" that Keystone supports the entry of judgment in its favor. Keystone involved a declaratory judgment action instituted by an auto dealer and a customer on behalf of themselves and all similarly situated persons. The plaintiffs asked the court to hold that the monetary value of a manufacturer's rebate given to new vehicle purchasers not be included as part of the gross receipts or selling price on which ROT is assessed. Keystone, 69 Ill. 2d at 484-85, 372 N.E.2d at 651-52. After quoting the definition of gross receipts and selling price, previously quoted *supra*, the court stated:

> Section 2 imposes the tax specifically upon the seller's gross receipts. Where those receipts are not in any way reduced, the full

> amount thereof is subject to the tax. This case does not present a situation such as that in Martin Oil Service, Inc. v. Department of Revenue (1975), 30 Ill.App.3d 927, 334 N.E.2d 227, where the appellate court held that a cash discount given to a purchaser by the seller may be deducted from taxable receipts. Indeed, article 111, section 4(b), of the Department of Revenue Rules and Regulations expressly provides that where a discount is allowed the purchaser by the seller, the amount of the discount is not subject to tax since it is never received by the seller. We find nothing in the Act or regulations, however, permitting a seller to deduct from his gross receipts an amount paid by a third party directly to the purchaser even though the purpose of the payment is to reimburse the purchaser for a part of the purchase price. The gross receipts of the seller remain the same whether or not a rebate is paid by someone not directly involved in the retail sale.
>
> Plaintiffs argue that since the purchasers reimburse the seller for the tax payments, the tax should be levied on the actual sales price as determined by looking through the eyes of the purchasers. Plaintiffs assert that as far as they are concerned, the cost of the auto did not include the $500 manufacturer's rebate. This argument, however, ignores the taxation scheme provided in the Act. It is the retailer who is taxed, not the purchaser, and the retailer has the legal obligation to pay the tax whether or not he collects it from the purchaser. While the manufacturer's rebate is unquestionably offered as an inducement to a purchaser to buy a car, it neither changes the character of the transaction between seller and purchaser nor affects the liability of the retailer to pay a tax computed on the basis of the amount received by him.

Keystone, 69 Ill. 2d at 487, 372 N.E.2d at 653.

Taken together with a consistent reading of the definitions of related terms set forth in § 1 of the ROTA, Keystone stands for the proposition that ROT must be measured by the amount of valuable consideration that is passed from the purchaser to the seller for the tangible personal property sold at retail, even if the purchaser subsequently recovers some of that consideration from the manufacturer after the purchase. And while the court rejected the plaintiffs' argument in Keystone that the retailer's selling price must be determined "by looking through the eyes of the purchaser," its rejection of that argument must be viewed in light of the facts of that case.

The purchasers in Keystone, the Cohens, agreed to pay and actually paid $4,800 for a new Chevrolet Monza they purchased from Keystone. The Cohens also paid to Keystone, and Keystone paid over to the Department, a 5% tax of $240, based on that actual selling price. Both the purchasers and the retailer later filed a lawsuit in which they asked the court to recompute the tax to equal $215, so as to take into account the fact that the Cohens subsequently received $500 which the manufacturer, General Motors Corporation ("GMC"), promised to rebate to the Cohens after they made their purchase. Rather than agreeing that tax should be measured by taking into account an act a non-party to the retail agreement has promised to perform (i.e., paying the purchaser $500), the Illinois supreme court instead focused on the consideration the purchasers actually paid to the retailer at the time of the sale at retail. Using the words of § 1 to paraphrase the court's decision in Keystone, the court held that the "selling price" upon which tax is due is the amount of the "valuable consideration" the purchasers actually paid to acquire the tangible personal property that was the subject of the "sale at retail." In that regard, the court's holding in Keystone is perfectly consistent with the court's approach when confronting the similar issue in Chet's — first, identify the parties to the "sale at retail," and then identify the amount of the "valuable consideration" that the "purchasers" actually transfer to the retailer to acquire the goods that are the subject of the "sale at retail."

The Department's motion, in fact, presents the perfect compliment of the plaintiffs' arguments in Keystone. That is, the taxpayers in Keystone wanted to reduce the tax base (i.e., the amount of the "valuable consideration" the "purchasers" actually tendered to the retailer to acquire the vehicle that was the subject of the "sale at retail") by the monetary value of a promise (the rebate offer) that a third party (GMC) made to one of the parties (the purchasers) to the sale at retail. Here, the tax collector wants to increase the tax base by the monetary value of a third party's

("Champion's") promise to one of the parties (the retailer) to the sale at retail. The Illinois Supreme Court, in Keystone and Chet's, refused to allow either taxpayers or the Department to manipulate the tax base in such a manner. Since §§ 1 and 2-10 of the ROTA must be construed in favor of taxpayers (Chet's, 71 Ill. 2d at 42-43, 374 N.E.2d at 470), I conclude that the plain text of those sections, and the decisions in Keystone and Chet's, support entry of judgment in "Apex's" favor, and against the Department.

Finally, the parties filed supplemental briefs to address the Department's recent proposal to amend regulation § 130.401, titled, "Meaning of Gross Receipts." 86 Ill. Admin. Code § 130.401.[4] "Apex" argues, *inter alia*, that the proposed amendment proves that the opinions previously set forth in private letter rulings were intended to be agency statements of general applicability, which cannot now be retroactively applied against it. The Department argues that existing regulation § 130.401 is broad enough to include the amounts at issue here, and that the proposed amendment does not constitute a change in the Department's interpretation of the base upon which ROT must be measured.

The Illinois General Assembly has the authority to write Illinois tax law; the Department does not. Ill. Const. of 1970, art. 9, § 1. ("The General Assembly has the exclusive power to raise

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[4] The part of the amendment at the heart of the parties' supplemental arguments adds the following underlined text to the first sentence in the current regulation:

> "Gross receipts" means all the consideration actually received by the seller, except traded-in tangible personal property. If the seller receives a reimbursement or rebate from any source, the amount of that reimbursement or rebate is considered part of the gross receipts received by the seller and is fully taxable. For example, when an automobile dealer sells an automobile for $20,000 to a customer and takes a trade-in valued at $10,000, the automobile dealer's gross receipts from the sale upon which tax must be calculated are $10,000. It does not matter whether the customer paid the entire $10,000 or whether the customer paid $7,000 and the automobile manufacturer paid the remaining $3,000 under a rebate program. In both situations, the automobile dealer's gross receipts from the sale are $10,000 and that is the figure upon which the tax calculation must be based.

revenue by law except as limited or otherwise provided in this Constitution. The power of taxation shall not be surrendered, suspended, or contracted away."). Instead, the legislature gave the Department the authority to promulgate reasonable regulations to interpret and administer the provisions of the various acts it is charged with enforcing. *E.g.*, 35 **ILCS** 120/12; Canteen Corp. v. Department of Revenue, 123 Ill. 2d 95, 102, 525 N.E.2d 73, 76 (1988). The Department's authority to apply any adopted regulations, moreover, is also limited by the Illinois Administrative Procedures Act ("IAPA"), which provides that "[n]o agency rule is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection and filed with the Secretary of State as required by this Act." 5 **ILCS** 100/5-10(c).

Here, the legislature has defined the term "gross receipts," and it has also defined, in the same section of the ROTA, other related terms used throughout the Act. 35 **ILCS** 120/1, 2-10. When the Illinois supreme court has had the opportunity to consider the legislature's definition of "gross receipts," and what amounts should be included within that term, it has construed the statutory definition by taking into account the definitions of other related terms also set forth in § 1 of the ROTA. Keystone, 69 Ill. 2d at 487, 372 N.E.2d at 653; Chet's, 71 Ill. 2d at 42, 374 N.E.2d at 470.

I take note that, as of this writing, the second notice period regarding the proposed regulation is on hold. Since the proposed amendment has not been adopted, I recommend that the Director heed § 5-10(c) of the IAPA, and not seek to apply the proposed amendment to regulation § 130.401 against "Apex", even if it is later adopted prior to the resolution of this contested case.

**WHEREFORE, IT IS RECOMMENDED THAT:**

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24 Ill. Reg. 19030.

- The Director grant "Apex's" motion, and enter judgment in its favor;
- The Director deny the Department's motion;
- The Director revise the NTL previously issued to "Apex" to show no liability, and that it be finalized as so revised.

6/28/01
**Date**

**Administrative Law Judge**